Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1241

MARLENE WAGNER, MARY ELLEN NORTON, GERALDINE H. BRDAR, WILLA McGUIRE, and FRANCES B. BECTON,

Petitioners,

vs.

BURLINGTON NORTHERN INC., a corporation, and THE BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, LODGE NO. 1047,

Respondents.

BRIEF OF RESPONDENT BURLINGTON NORTHERN INC. IN OPPOSITION

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OPINIONS BELOW

The Court of Appeals opinion is unpublished and unreported and said opinion has been reprinted in Appendix A at the back of the petition for a writ of certiorari, pages 1a-8a. The memorandum opinion of the District

Court granting defendants partial summary judgment, dated April 14, 1976, is officially reported at 411 F. Supp. 537 (1976). The memorandum opinion granting defendants' summary judgment on the amended complaint subsequently filed by three of the original plaintiffs is unreported and unpublished. The opinions of the District Court have been reproduced by Respondent Union in Appendices A and B attached to their Brief in Opposition.

QUESTIONS PRESENTED

1. Whether or not the Court of Appeals properly affirmed the District Court's decision that there was no genuine issue as to any material fact and that the case was ripe for summary judgment.

2. Whether the Court of Appeals correctly concluded, in agreement with the District Court:

(a) That the job assignments given to petitioners by the Respondent Burlington did not violate the Merger Protection Agreement between the Respondent and the Union, and did not "put them in a worse position with respect to their employment" within the meaning of § 5(2)(f) of the Interstate Commerce Act (49 U.S.C. § 5(2)(f); and
(b) That the Union did not breach its duty of fair representation in its handling of petitioners' grievances.

STATUTES INVOLVED

Section 5(2)(f) of the Interstate Commerce Act (49 U.S.C., § 5(2)(f)).

Section 3, Second, of the Railway Labor Act (45 U.S.C., § 153, Second).

STATEMENT OF THE CASE

The Respondent Union, in its Brief in Opposition, has stated the facts in this case and, as such, Respondent adopts as its statement of the case the Union's statement of the case at pages 3-6 of the Union's brief. The statement of the case as set forth by the Union is correct, and in an effort to avoid repetition, respondent so adopts the Union's statement of the case.

REASONS FOR DENYING THE WRIT

The petitioners have failed to disclose where there exists a genuine issue as to any material fact. Petitioners have claimed that their affidavits conflicted with those submitted by the respondent and the Union, but the affidavits furnished by the petitioners have been addressed only to the Union and not the respondent. The only allegation by the petitioners against the respondent is that the respondent violated the terms of the Merger Agreement. As such, petitioners have not set forth the disputed questions of fact as between the petitioners and respondent, and the Court of Appeals properly affirmed the decision of the District Court that there was no genuine issue as to any material fact and that the case should be disposed of on a motion for summary judgment. Rule 56 of the Federal Rules of Civil Procedure.

Petitioners, at page 10 of their petition, have stated:

> "The actions of the Appellate and District Courts have, in effect, supplanted the terms of the Agreement, irreparably and permanently damaging the position of the plaintiffs-petitioners, supplanting the validity of the Union-Management Agreement, ultimately in direct conflict with the basic welfare and interests of the nation."

However, the Court of Appeals correctly found, in agreement with the District Court, that the new job assignments given petitioners did not put them in a "worse position" within the meaning of 5(2)(f) of the Interstate Commerce Act. "Worse position" has been construed by the United States Supreme Court to mean wages, and only wages. *Brotherhood of Maintenance of Way Employees v. United States*, 366 U.S. 169 (1961).

Petitioners have claimed that the Seventh Circuit's decision in the present case is contrary to the United States Supreme Court decision in *Hines v. Anchor Motor Freight*, 424 U.S. 554 (1976). This is incorrect, as there was no evidence that the representation afforded the petitioners by the Union was tainted by animosity, hostility, gross negligence or dishonesty. The petitioners' grievances were submitted by the Union to final and binding arbitration before the Special Board of Adjustment which rendered a decision denying the petitioners' claims (R-2, Exhibit B, Volume 2). Petitioners have not set forth any facts that would impeach the award of the Special Board and there is no basis under Section 3, Second, of the Railway Labor Act for setting aside the award issued by the Special Board with respect to severance pay.

Petitioners have argued that they were denied equitable relief and due process because the decisions of the Court of Appeals and the District Court are in conflict with the power and the provisions of the Constitution of the United States. This is merely a statement by the petitioners without a specific discussion as to how the decisions by the District Court and the Appellate Court conflict with Articles 1 and 8 of the United States Constitution. The seven questions presented by the petitioners in their petition are not fully discussed in the petitioners' reasons for granting the writ, and there are no issues warranting the grant of certiorari by this Court.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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